

1                                    **BEFORE THE**  
2                                    **SURFACE TRANSPORTATION BOARD**

3                                    \_\_\_\_\_  
4                                    **STB EX PARTE NO. 646**

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6                                    **RAIL RATE CHALLENGES IN SMALL CASES**  
7                                    **Due: APRIL 16, 2003**  
8                                    \_\_\_\_\_

9  
10                                   **COMMENTS OF**  
11                                   **MONTANA WHEAT & BARLEY COMMITTEE**  
12                                   **COLORADO WHEAT ADMINISTRATIVE COMMITTEE**  
13                                   **IDAHO BARLEY COMMISSION**  
14                                   **IDAHO WHEAT COMMISSION**  
15                                   **KANSAS WHEAT COMMISSION**  
16                                   **SOUTH DAKOTA WHEAT COMMISSION**  
17                                   **WASHINGTON BARLEY COMMISSION**  
18                                   **WASHINGTON WHEAT COMMISSION**  
19                                   \_\_\_\_\_

20  
21    Comes now, the above listed parties, referred to as the Wheat & Barley  
22    Commissions, by and through its representative and submits these Comments in  
23    STB Ex Parte No. 646, *Rail Rate Challenges In Small Cases*, pursuant to the  
24    decisions of the Surface Transportation Board served in this docket on March 26,  
25    2003 and April 1, 2003.

26  
27    By virtue of its Notice of Intent to Participate dated April 11, 2003, the Wheat &  
28    Barley Commissions files their written comments and it requests they be entered  
29    into the record. Your representative also states that Wheat & Barley  
30    Commissions do not anticipate, due to scheduling conflicts, participating in the  
31    Public Hearing part of this proceeding.

1  
2 The Wheat & Barley Commissions thank the Surface Transportation Board for  
3 undertaking this proceeding. The lack of agricultural complaints for the last  
4 decade are proof positive that the current procedures do not work for small case  
5 shippers. The Wheat & Barley Commissions call on the STB to look not just at  
6 the process but the substance behind the lack of small case complaints. If one  
7 looks at the Federal Regulatory Commission where hundreds of rate complaints  
8 large and small are handled each year, there is definitely room for improvement.  
9 The lack of small or large rate complaints, when there are four major railroads  
10 controlling over 92% of the rail business, cannot suggest logically that there is  
11 not grounds for complaints. According to Senator Dorgan, in the rail customer  
12 hearing held last year in front of the Senate Commerce Committee, he believes  
13 there are hundreds of complaints that could be adjudicated but the process and  
14 the environment are not conducive to elicit action from the captive rail customers.  
15 Collectively, the Wheat & Barley Commissions represent over 100,000 farm  
16 producers. *Wheat and Barley producers do not have economic alternatives to*  
17 *rail transportation.* They are captive and tied to rail transportation with no viable  
18 alternatives. *Wheat and Barley producers are unique because they bear the cost*  
19 *of freight transportation and cannot pass on increased transportation costs to*  
20 *their customers.*

21  
22 **Views of Wheat & Barley Commissions:**

- 23       • Fear of railroad economic power and potential retaliation against  
24       captive rail customers for filing complaints coupled with a small case  
25       process that is too complex and fraught with dubious outcome are the  
26       main reasons why rail customers are not participating in the process.  
27       • The rate complaint process is still too complex  
28       • It appears that Simplified guidelines for small shippers result in rate  
29       levels considerably higher than constrained market pricing (CMP)  
30       models.

- 1       • Any rail customer contemplating a rate case must hire consultants to  
2       go through a very costly process of determining which system of  
3       regulatory oversight (PCM or small rate case standards) should be  
4       utilized by the potential complainant.
- 5       • The process is fraught with uncertainty, and since no one has filed a  
6       complaint under the simplified guidelines, they are fully aware that any  
7       decision that is released by the STB is going to be challenged by the  
8       railroads, thus a full appeal must be contemplated in any simplified  
9       small shipper case. It is fully anticipated that the first few small rate  
10      cases decided by the Board will be challenged by the Association of  
11      American Railroads (AAR) and the respondent railroad in federal court,  
12      contending that the guidelines do not fulfill the Congressional directive  
13      to establish a simple and expedited method of determining rate levels  
14      in small cases.
- 15     • With the STB's latest decisions in major rate cases, the study of rail  
16     costs associated with mainlines vs. branchlines has taken on a  
17     paramount importance prior to filing and probably eliminated many  
18     branchline points from future consideration for rate complaint action.  
19     This PPL decision causes further consternation to potential future rate  
20     complainants. The standards continue to change and change creates  
21     uncertainty.
- 22     • The STB actions suggest that it is focusing on dispute resolution as a  
23     way of creating a dialogue between rail customers and the dominant  
24     rail carriers.
- 25     • There seems to be a continuing STB focus on process rather than  
26     substance.
- 27     • Most shippers that would contemplate a small rate case, with its  
28     complexity, do not feel that adjudication can be justified economically  
29     based upon the movement revenues.

## **Background on STB Rate Regulation:**

49 USC 10101 - Title 49 SubTitle IV, Part A, Chapter 101 “In regulating the railroad industry, it is the policy of the United States Government (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; ... (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board, (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense; (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes; (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital; ...

The Staggers Act of 1980, while deregulating the railroads, gave the ICC, now the STB, rate regulation over freight traffic not subject to competition. The Board has the authority to determine the reasonableness of challenged rates in the absence of competition.

Under current procedures, after a rail customer files a complaint the Board assesses whether the railroad dominates the rail customers transportation market and movements. To determine what is known as ‘market dominance’ the Board utilizes quantitative and qualitative analyses.

1. The STB determines whether the rates are above the 180% revenue to cost level as the threshold of rates to consider as unreasonable
2. The STB determines whether the rail customer has a competitive alternative in the form of access to another railroad or alternative modes of transportation. (The STB has done away with two other criteria of

1 competition – namely product (are there alternative substitution products)  
2 and geographic (are there ability to ship from alternative locations).

3 3. If the Board determines one and two then the Board proceeds with  
4 assessments to determine whether rates being charged the shipper is  
5 unreasonable.

6

7 Under the STB's alternative guidelines to simplify complaints (in small cases)  
8 (required under the ICC Termination Act of 1995) involving lower amounts, it  
9 established a simplified 'small' case criterion. The Board issued simplified  
10 guidelines for determining the reasonableness of a challenged rate and  
11 addressed some of the barriers to filing a complaint.

12

13 Under its standard guidelines, to determine whether a rate is reasonable, the  
14 Board requires the shipper to demonstrate how much an optimally efficient rail  
15 carrier would need to charge. This method requires construction of hypothetical  
16 model which develops an optimally efficient railroad to replace the dominant  
17 railroad. The costs of such determinations are very high and the time for  
18 processing a full blown rate is very long. In the case of the McCarty Farms case,  
19 the last major agricultural case brought, it took 16 years for the agricultural  
20 producers to have the ICC/STB rule that rates in Montana that were in excess of  
21 250% of variable were 'not unreasonable.' This was after the rail costing and  
22 procedure was changed several times in the case. The McCarty Farms case  
23 cost producers and the State Of Montana over \$3 million and that figure does not  
24 include attorney fees. Not the ICC/STB's finest hour.

25

26 The new 'speed up' guidelines move the cases along - simplified small cases  
27 suggesting record closing after 6 months and decisions within 9 months, and full  
28 blown rate cases completed within 16 months.

29

30 It appears that the alternative simplified guidelines which have never been tested  
31 at the STB may not yield results that are comparable with CMP rate guidelines

1 requiring a prospective complainant to first determine what the results would be  
2 under CMP and then under simplified guidelines. This exercise is expensive and  
3 time consuming.

#### 4 5 **The Problem of Defining Small Rate Case**

6  
7 The definitions of small cases are not clearly defined. A large company may in  
8 fact be a small shipper from rate case standpoint while they ship large numbers  
9 of rail shipments in total, the characteristics of the type of shipment patterns may  
10 in fact ship to a multitude of origin-destination pairs while showing small case  
11 movement characteristics. Yet even with these large rail customers, the issues  
12 of the value of filing a case that costs hundreds of thousands of dollars, perhaps  
13 even a million dollars or up on a single origin-destination pair may not prove to be  
14 prudent. Who knows- the origin-destination pair in question, might not even be a  
15 source of income for the rail customer by the time the rate case gets adjudicated.

16  
17 The small case captive rail customer is looking at a railroad with deep pockets  
18 and a long memory. In most cases, the captive rail customer's financial outlook  
19 is tied to shipping by rail and without rail, they cannot generate income. One  
20 must be mindful that rate cases don't come from non-captive rail customers.

21  
22 The STB did not adopt in its small case guidelines any firm definition of what  
23 constitutes a small case complainant. The STB wants the potential small case  
24 complainant to demonstrate why a full CMP case would be too costly. Thus a  
25 small case complainant is faced with the daunting task of proving a  
26 demonstration of 'smallness' under a case by case moving standard BEFORE it  
27 can proceed with its case which may then run under either a full case or a small  
28 case standard. A prudent representative would advise any client to prepare for  
29 both cases – thus eliminating the effects of 'simplified' rules. It is also difficult for  
30 a potential complainant to see their way clear to start down the path to pursue a  
31 small case and find out that the STB suddenly wants a full CMP case produced.

1  
2 The small case guidelines (non-CMP) suggests three indicators to determine  
3 reasonable rate levels: RSAM (Revenue Shortfall Allocation Method, Average  
4 Revenue-to-Variable Cost >180 and Average Revenue-to-Variable Cost Ratios  
5 on Comparable Traffic. Each of these methods have a number of issues that  
6 have yet been settled on for adjudication purpose, so the small case potential  
7 complainant is left with a moving target which gives results that in some cases  
8 are considerably above the 180% of variable.

9  
10 This untried case law and possible moving targets leave the small case shipper  
11 with too many unknowns and risks to file a small rate case.

### 12 13 **IS THERE A NEED FOR SMALL RATE CASES?**

14 The railroads would have one believe that the reason no small rate cases have  
15 not been filed is that there is little reason for them to be filed. Four major  
16 railroads control over 92% of the U.S. railroad business. Examples of rate  
17 disparity are legion and constantly voiced to Congressional representatives by  
18 many different industries.

19  
20 U.S. agriculture is the lowest cost producer in the world. Yet they are  
21 traditionally the 'residual supplier' in the world. Are they poor marketers? Are  
22 the other countries whose production costs are higher simply better at  
23 marketing? No – the answer lies in large part with the fact that U.S. marketers  
24 have some of the highest inland transportation costs. The rail costs are among  
25 the highest in the world.

26  
27 The market dominant railroads feel they have the right to control commodity price  
28 of the commodities they move. In front of the Senate Commerce Committee last  
29 year one of the railroad agricultural pricing Vice Presidents stated in bold terms.

30 – "What we do as a rail transportation provider is look at the  
31 difference between the value of the grain at the origin and value of

1 the grain at the destination, and try and determine the level of  
2 charges for transportation with margin for the elevators to operate  
3 and make money.”

- 4 – “The fact that winter wheat off the Texas gulf at the destination has  
5 a lower value than hard Spring wheat off the PNW...it is clear  
6 Spring wheat has a higher value. Therefore, it can stand a higher  
7 transportation cost and still move in the marketplace.”

8  
9 In a competitive market place, no single company could market in this way. Only  
10 a railroad with total market dominance over its traffic base can price in this  
11 manner.

12  
13 Can we find excessive rate levels on wheat and barley being charged on small  
14 rate case commodity movement moving under tariffs? A review of the tariff rates  
15 from the Wheat and Barley states represented by the Wheat & Barley  
16 Commission shows:

- 17  
18 • On westbound movements to the Pacific Northwest ( a major movement  
19 pattern for wheat from single railroad (UP and/or BNSF) origins which  
20 moves into export to the near and far east), rates with average  
21 revenue/variable cost levels on small car movements from:
- 22 ○ Colorado as high as 210-250% of variable cost
  - 23 ○ Idaho as high as 250-300% of variable cost
  - 24 ○ Kansas as high as 200-250% of variable cost
  - 25 ○ Montana as high as 250-330% of variable cost
  - 26 ○ North Dakota as high as 220-300% of variable cost
  - 27 ○ South Dakota as high as 220-260% of variable cost
  - 28 ○ Washington as high as 200-250% of variable cost
- 29  
30 • On southbound movements to the Gulf Coast ( a major movement pattern  
31 for wheat from single railroad origins (UP &/or BNSF) which moves into



1 export to the near east, Africa, etc.), rates with average revenue/variable  
2 cost levels on small car movements from:

- 3 ○ Colorado as high as 210-250% of variable cost
- 4 ○ Kansas as high as 200-260% of variable cost
- 5 ○ South Dakota as high as 200-230% of variable cost

6

7 • On eastbound movements to the Twin Cities ( a major movement pattern  
8 for wheat from single railroad origins which moves into export to the near  
9 east, Africa, etc.), rates with average revenue/variable cost levels on small  
10 car movements from:

- 11 ○ Montana as high as 250-400+% of variable cost
- 12 ○ North Dakota as high as 250-490+% of variable cost
- 13 ○ South Dakota as high as 250-480+% of variable cost

14

15 • On westbound movements to the Pacific Northwest ( a major movement  
16 pattern for barley from single railroad origins (UP &/or BNSF) which  
17 moves into export to the near and far east), rates with average  
18 revenue/variable cost levels on small car movements from:

- 19 ○ Idaho as high as 200--240% of variable cost
- 20 ○ Montana as high as 200-240% of variable cost
- 21 ○ Washington as high as 200-280% of variable cost

22

23 How much is too high? Is 190% of variable too high? How about 220%? How  
24 about 250%, 300%, 350%, 400%, 450%, or even higher than 500%? Yet no  
25 agricultural rate complaints on small or large cases? While argument can be  
26 made over the exact revenue/variable cost level calculation, the reality is that the  
27 revenue/variable costs levels from captive small case shippers of grain are very  
28 high. The Ramsey pricing theories adopted by the ICC/STB are out of control  
29 due to the massive rail consolidations that have taken place over the last 20  
30 years. The Wheat & Barley Commission submit it was never envisioned by  
31 Congress that such huge disparities in rates would be allowed to develop

1 between those who have rail-to-rail competition and those who do not have rail-  
2 to-rail competition. Yet the system of railroad pricing allows railroads to base  
3 railroad market dominating pricing on the degree of rail customer captivity  
4 instead of differentially pricing based upon consumer demand like virtually all  
5 other capital intensive industries.

6  
7 The captive shipper base is growing with each successive rail merger– now  
8 estimated to be over 30% of all rail shippers. The regulatory oversight for small  
9 rate cases continues to function as if there are over 40 Class I's which existed  
10 when the Staggers Rail Act was passed in 1980.

11  
12 Whole states of the country are now captive to single railroads. Indeed, whole  
13 regions and even whole industries are completely captive to a single railroad.

14  
15 In most cases, the agricultural rail customers ship to many destinations. The  
16 result is that in many instances there is not a single origin-destination pair whose  
17 revenues would lend itself to the economics of a rate complaint.

18  
19 There is a definite need for small rate cases.

20  
21 **Why Are There Not More Small or Large Rate Cases? FEAR Of Railroad Economic**  
22 **Power Coupled With a Small Case Process That Is Complex With Dubious**  
23 **Outcome.**

24 The main reason is simply fear. Fear from the rail captive rail customer of  
25 railroad reprisals if 'a shipper steps out of line'. Many who do not deal with  
26 captive rail customers everyday find this difficult to accept. After all, the railroads  
27 are 'for profit' companies, and the rail customers should be able to just sit down  
28 with the railroads and negotiate a commercial transaction.

29  
30 Where railroads have rail-to-rail competition in the market place that is the norm.  
31 However, where a rail customer is captive, the railroads do not behave in the

1 same way. Railroads with captive markets have sought to increase the captivity  
2 levels of their rail customers. For example, through bundling, railroads have  
3 been able to extend their market dominance to include facilities located in rail-to-  
4 rail competitive points.

5  
6 What fear are captive shippers speaking of? Fear of reprisals from market  
7 dominant railroads. In the agricultural transportation market, with change of just  
8 a few cents in the traditional cross country differential of the agricultural tariff rate  
9 a railroad can wipe out an elevator's long-established competitive position. Why  
10 would a railroad actually do such a thing? To keep 'order' in their house. What  
11 the railroads feel is at stake is their right to charge high rates to captive shippers  
12 in areas where they are the sole railroad, known as their 'franchise' area. In the  
13 captive areas, the railroads have all the rail business. In the event of an elevator  
14 becoming uncompetitive (or seeks a rate complaint), a change in a long-standing  
15 cross-country differential will simply move the grain to another captive elevator.  
16 Thus the railroad still gets the business. Who bears for the increased shipping?  
17 The farm producer bears the cost. The rail customer is faced with a market  
18 dominant railroad that has proven to be effective at wearing out complainants  
19 and tenacious in its defense by pouring huge funds into litigatory defense  
20 knowing whether they win or lose the railroad will be able to find other captive  
21 shippers to pay the costs. For the rail customer their competitive position may  
22 be dictated by railroad actions or inactions.

23  
24 Has the STB been helpful to the small case captive shipper? When a small case  
25 shipper, after trying to work through problems with a market dominant railroad,  
26 complains to the STB on captive rate issues, in the recent past, the letter was  
27 passed onto Mel Clemens, head of the Office of Compliance and Enforcement.  
28 Mr. Clemens is well respected for his work. He in turn passes the letter on to the  
29 railroad the small case shipper is complaining about. The railroad then writes a  
30 letter to the small case shipper basically regurgitating the history and solving  
31 nothing. How is this process helpful to the small case captive shipper? Surely

1 this process is not considered advocacy by the STB. The small case captive  
2 shipper has once more become a target for the market dominant railroad this  
3 time with the appearance of acquiescence of the STB. Nothing has been solved  
4 except more railroad wrath for the small case captive shipper.

5  
6 Negotiations of reasonable rates by small case rail captive customers are nearly  
7 impossible. The dominant railroad will simply state what the rail rate or rail  
8 practice is going to be. If a rail customer is trying to compete against a  
9 competitor whose rate structures are the result of competition between railroads,  
10 the market dominant railroad believes it can set and influence the market place  
11 price for the commodity. Rail customer presents evidence that a competitor  
12 located on a competitive line is causing marketing problems (geographic  
13 competition) for the rail customer. Experience has shown that the market  
14 dominant railroads during a rate negotiation process state that they don't  
15 compete with your competitors located on another carriers line and the rail  
16 customer must be flexible and change their market areas! These are real  
17 responses by the market dominant railroads to small case captive rail customers.

18  
19 Are these fears well founded? Railroads show up in every legislature of the  
20 states represented by the Wheat and Barley Commissions trying to defeat any  
21 legislation that would enhance rail customer's competitive position. The railroads  
22 fight issues like increased truck weights, economic development efforts that  
23 study lack of competition, and any increased access to competition such as river  
24 navigation, etc. Railroads label any suggested change as re-regulatory even if  
25 the change is clearly not re-regulatory. Railroad's argue that government  
26 intervention is *necessary* to insure that they earn "adequate revenues," while at  
27 the same time, railroad's argue that no government intervention is necessary to  
28 limit their monopoly power!

## 1 **Suggested Solutions**

- 2 • Allow the creation of small case rail customer STB Small Case Advocacy  
3 Office to advocate for small case rail customer interests.
- 4 • Simplify Market Dominance Test in Small Rate cases:
  - 5 ○ If rate on a system-wide average basis are over 180% of revenue  
6 to variable cost and,
  - 7 ○ Over 60 percent of shipments from facility move via a single  
8 railroad.
  - 9 ○ The railroad has market dominance over the subject traffic.
- 10 • Rate Analysis for small rate cases:
  - 11 ○ If railroad has market dominance over complained traffic, the STB  
12 or its advocacy function would develop simplified standards that  
13 would mirror CMP results for small rate cases or alternatively assist  
14 small rate rail customers in development of CMP cases.
  - 15 ○ Rate comparisons analysis would also be made for rates on  
16 product that move similar distance to the same markets from areas  
17 where rail-to-rail competition exist
  - 18 ○ In the event that competitive movements from rail competitive areas  
19 show substantial disparity in rate levels, small case rail customers  
20 would be allowed to select a market based remedy which would  
21 require a market dominant railroad to adjust the small case captive  
22 shipper rates to no more than 120% of the rates being charged on  
23 the competitive movement.
- 24 • STB would, under *49 USC 10101 (6)*, become a proactive force for  
25 “maintaining reasonable rates where there is an absence of effective  
26 competition and where rail rates provide revenues which exceed the  
27 amount necessary to maintain the rail system and to attract capital”  
28 thereby protecting captive small case shippers in those rail customer  
29 captive areas where revenue to variable cost levels are above the 180%  
30 of variable cost levels. In most cases the reasons behind the

1 development of captive agricultural areas are the adverse effects of  
2 lessening of competition approved by the ICC/STB in prior rail mergers.

3  
4 **Summary**

5 To reiterate, one must be mindful that rate cases, large and small, don't come  
6 from non-captive rail customers. The Staggers Rail Act in 1980 suggested two  
7 major themes – (1) increase rail economic health through deregulation and (2)  
8 protection for the few captive rail customers that would occur due to the effects of  
9 deregulation. These two major themes were not intended to be competing  
10 legislative goals but the ICC and now the STB has allowed so much complexity  
11 to enter into the protection theme that there is little or no effective protection for  
12 captive rail customers. The ICC/STB has allowed the two major themes to  
13 become competing themes. Yet the protection of captive rail customers  
14 continues to be one of the prime directives established by the Staggers Rail Act  
15 in 1980 in 49 USC 10101 (1) + (4) + (5) + (6). Protection of small case captive  
16 shippers from market abuse by market dominant railroads is not the same as  
17 facilitating small rate case access to a complicated, time consuming abusing rate  
18 complaint process. The Wheat & Barley Commissions thank the Board for the  
19 opportunity to participate in this proceeding.

20 Respectfully submitted,  
21 Wheat & Barley Commissions  
22 By their representative,

23   
24

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